UNITED STATES of America, Plaintiff,

v.

Albert J. SUDZUS, Jr., Imad Naim Saadeh, Dickie Lynn and Barbara Sudzus, Defendants.

No. 92 Cr 102.

United States District Court, N.D. Illinois, E.D.

July 2, 1992.

MEMORANDUM OPINION AND ORDER

ASPEN, District Judge:

Defendants Albert J. Sudzus, Jr., Imad Naim Saadeh, Dickie Lynn[1] and Barbara Sudzus are charged in the indictment with one count of conspiring to knowingly and intentionally possess with the intent to distribute approximately five kilograms of cocaine in violation of 21 U.S.C. § 841(a)(1). Defendants Barbara Sudzus, Albert Sudzus, Jr. and Saadeh have filed motions to suppress all evidence seized by agents of the Drug Enforcement Administration ("DEA") from the premises of Euro-Tech Automotive ("Euro-Tech"), located at 1719 Pershing Road, Chicago, Illinois. For the reasons set forth below, the motions are denied.

I. Background

On June 24, 1992, this court conducted an evidentiary hearing in conjunction with the instant motions. Consistent with the assertions contained in their respective

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[1] Defendant Lynn is presently a fugitive.

briefs, the government and defendants presented polarized accounts of the events of February 11, 1992. On that date, pursuant to the efforts of its confidential informant, the government arranged to sell approximately five kilograms of cocaine to Albert Sudzus, Jr., the transaction to take place at Euro-Tech. After the confidential informant had entered and exited the building, the government claims that DEA agents entered Euro-Tech through a set of glass door [sic] open to the public. Upon entering through the outer doors, the agents encountered a vestibule and two locked glass doors leading to the inner offices. The agents identified themselves to Barbara Sudzus who was sitting at her desk, visible through a window in the vestibule. After identifying themselves, the agents asked Barbara at least twice for permission to enter through the inner doors. Barbara, however, refused to "buzz" the agents through the doors. Instead, she yelled back to her co-defendants, indicating that the police were outside. Upon observing defendant Saadeh approaching the vestibule, the agents forcibly broke through the inner doors and proceeded to "sweep" and secure the premises. At no time while inside the vestibule did any of the agents draw a gun. Once the building was secure, Agent Maloney approached Barbara, who was still in her office, and explained to her why the agents were present. Maloney asked Barbara if she had access to the building and if she "had control" over the premises. According to the agent, she responded in the affirmative. Maloney then asked for her permission to search the premises for money, narcotics and guns. Barbara responded, "Go ahead, we have nothing to hide," at

which point Maloney invited her to sign a written consent form. The agent maintains that he explained the nature of the form, that Barbara indicated her understanding of its implications and that she signed the consent form. Further, Maloney stated that he obtained her oral and written consent prior to searching the inner offices and work area of Euro-Tech. The agents' search rendered $15,000 seized from a desk in the inner offices and $35,000 from a toolbox located in the work area. Although the toolbox was locked, the agents did not have to break through the lock, as Saadeh admitted that he owned the toolbox and handed an agent the key.

Barbara Sudzus, on the other hand, claims that three agents entered the vestibule with their guns drawn, yelling "open the door." When she refused, they proceeded to break the door down with a battering ram, pointing their guns to her head and yelling "freeze." Barbara asserts that upon gaining entrance through the inner doors the agents began their search without any consent. She denies giving oral permission prior to the search, and likewise denies telling Maloney that she controlled the building. Rather, Barbara maintains that she affirmatively stated that her son, Albert Sudzus, Jr., owned the building and that she did not have the authority to consent to a search of Euro-Tech. With respect to the written consent form, Barbara claims that she did not sign that form until after the agents had searched the premises, and not until one hour after their forced entry. She asserts that she signed the form after the agents had told her that it was a mere formality and that if she refused they would obtain a warrant.

Given these two conflicting stories, this court is faced with a question of credibility – an issue we resolve in favor of the agents. Under the factual circumstances as described by the agents, we turn to consider defendants' legal arguments in support of suppression.

II. Discussion

As defined by the parties, the issues confronting this court are as follows: (1) Have defendants Saadeh and Al Sudzus, Jr. demonstrated a "legitimate expectation of privacy" in the invaded place entitling them to protection under the Fourth Amendment?; (2) Was the initial warrantless intrusion through the locked inner doors justified by "exigent circumstances"?; and (3) Was Barbara Sudzus' consent sufficient to justify the warrantless search of the inner offices and work area? This court, however, is of the opinion that defendants' motion properly may be resolved solely on the basis of the third issue listed above. Even if we were to assume that the initial intrusion ran afoul of the Fourth Amendment, exclusion of the subsequently seized items is not an automatic mandate under the "fruit-of-the-poisonous-tree" doctrine. It is well established that in determining whether evidence is tainted by a prior illegality, courts must assess whether the evidence was " 'come at by exploitation of [the initial] illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' " Segura v. United States, 468 U.S. 796, 804, 104 S.Ct. 3380, 3385, 82 L.Ed.2d 599 (1984) (quoting Wong Sun v. United States, 371 U.S. 471, 488, 83 S.Ct. 407, 417-18, 9 L.Ed.2d 441 (1963)) (emphasis added in Segura); United States v.

Valencia, 913 F.2d 378, 382 (7th Cir.1990). In this vein, the Seventh Circuit has held that voluntary consent, as defined for Fourth Amendment purposes, is an intervening act free of police exploitation of the initial illegality, and is sufficiently distinguishable from such illegality to purge the evidence of the primary taint. Valencia, 913 F.2d at 382; see also United States v. Walker, 933 F.2d 812, 817 (10th Cir.1991), cert. denied, 112 S.Ct. 1168, 117 L.Ed.2d 414 (1992); United States v. Troutman, 590 F.2d 604, 606 (5th Cir.1979). Accordingly, this court's focus rests upon the validity of Barbara Sudzus' consent. Specifically: (1) Did she have authority to consent?; (2) Was her consent voluntary?; and (3) Was the search beyond the scope of the consent?

1. Authority to Consent

Warrantless searches without probable cause do not violate the Fourth Amendment if an authorized individual voluntarily consents to the search. Florida v. Jimeno, 111 S.Ct. 1801, 1803, 114 L.Ed.2d 297 (1991); Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043-44, 36 L.Ed.2d 854 (1973). Legitimate authority to consent may be either actual, see United States v. Duran, 957 F.2d 499, 503-05 (7th Cir.1992), or apparent. See Illinois v. Rodriguez, 110 S.Ct. 2793, 2800-01, 111 L.Ed.2d 148 (1990). In any event, the government bears the burden of establishing the requisite authority. Duran, 957 F.2d at 503.

An individual possesses actual authority to consent by virtue of either owning the property to be searched, Rodriguez, 110 S.Ct. at 2797, or maintaining common

authority over, or some other significant relationship to, the premises. United States v. Matlock, 415 U.S. 164, 171, 94 S.Ct. 988, 993, 39 L.Ed.2d 242 (1974). Common authority does not "rest upon the law of property," but rather rests "on mutual use of the property by persons generally having joint access or control for most purposes." Id. at 171 n. 7, 94 S.Ct. at 993 n. 7. If, on the other hand, the individual does not in fact possess actual authority to consent, the search is nonetheless valid if the agents, at the time of the entry, reasonably believed that the consenter possessed common authority over the premises. Rodriguez, 110 S.Ct. at 1800-01; United States v. Towns, 913 F.2d 434, 442 (7th Cir.1990).

At a minimum, the facts as adduced at the suppression hearing support the conclusion that Barbara Sudzus possessed apparent authority to consent to the search of Euro-Tech. As the agents entered the premises, they first encountered Barbara behind the window in the vestibule. By virtue of the position of her work space, it is apparent that she monitored the entry of customers and others. This fact, coupled with her statement to Agent Maloney that she maintained control over the premises, including access to the building, is sufficient to conclude that the agents, at the time of the entry, reasonably believed that Barbara possessed common authority over Euro-Tech. Furthermore, the fact that Maloney discovered earlier that morning that Euro-Tech was the subject of a civil forfeiture does not alter our determination. The relevant question is not whether the agents believed Barbara owned Euro-Tech; rather, the issue is whether the agents reasonably believed she possessed common authority

over the premises – an issue independent from "the law of property."

2. Voluntariness

The agents' search of Euro-Tech pursuant to the consent of Barbara Sudzus is valid only if the consent was given freely and voluntarily. Bustamonte, 412 U.S. at 222, 93 S.Ct. at 2045; Duran, 957 F.2d at 502. Whether consent is voluntary, rather than the product of duress or coercion, is "a question of fact to be determined from the totality of all the circumstances." Bustamonte, 412 U.S. at 227, 93 S.Ct. at 2048; Duran, 957 F.2d at 502. The burden of proving voluntariness by a preponderance of the evidence rests with the government. Bustamonte, 412 U.S. at 222, 93 S.Ct. at 2045; Duran, 957 F.2d at 502.

The Court in Bustamonte made clear that no single factor is dispositive of the voluntariness issue. Bustamonte, 412 U.S. at 226, 93 S.Ct. at 2047. Among the relevant criteria to be considered are the defendant's age, lack of education or low intelligence, the lack of any advice to the accused of her constitutional rights, as well as evidence of coercion, such as prolonged detention or questioning. Id. In the instant case, defendants' claim that Barbara Sudzus was coerced rests on the following assertions: (1) that the agents did not advise Barbara of her right to refuse to consent; (2) that the officers informed her that if she did not sign the consent form they would come back with a warrant; and (3) that the agents did not ask Barbara for her consent until after they had searched the building and recovered the currency.

The evidence developed at the suppression hearing directly contradicts Barbara's claim that the agents threatened her with the availability of a search warrant. Likewise, the evidence reveals that the consent was signed prior to the search of the inner offices and work area. The agents who testified, however, never specifically indicated that Barbara was informed of her right to refuse consent. Rather, Agent Maloney stated that he explained the nature of the form and that Barbara understood its implications. A defendant's lack of knowledge of the right to refuse consent, while not dispositive, is a significant factor in determining voluntariness. See United States v. Mendenhall, 446 U.S. 544, 558-59, 100 S.Ct. 1870, 1879-80, 64 L.Ed.2d 497 (1980); Duran, 957 F.2d at 503; United States v. Valencia, 913 F.2d 378, 381 (7th Cir.1990); United States v. Morgan, 725 F.2d 56, 58 (7th Cir.1984). The form which Barbara signed, however, explicitly states "I have not been threatened, nor forced in any way" and "I freely consent to this search." There is no evidence that Barbara is not of average intelligence, and the agents testified that she was not frightened or emotionally distraught at the time she reviewed the consent form. Under these circumstances, we find that Maloney's explanation of the nature of the form, as well as the explicit statements contained therein, served to put Barbara on notice of her right to refuse consent. See United States v. Durades, 929 F.2d 1160, 1167 (7th Cir.1991) (though not explicitly told that he had the right to refuse consent, the form signed by defendant communicates the essence of that right). Further, the lack of any physical or overt coercion, i.e., detainment, mitigates the purported failure

to inform Barbara of her right to refuse consent. Id. at 1166.

In sum, the evidence overwhelmingly supports the proposition that Barbara Sudzus furnished consent voluntarily.

3. Scope

Defendants argue that even if Barbara Sudzus voluntarily consented to the search with proper authority to do so, the search of the toolbox and desk was beyond the scope of the consent. We disagree. The scope of a search is generally defined by its expressed object. Florida v. Jimeno, 111 S.Ct. 1801, 1804, 114 L.Ed.2d 297 (1991) (citing United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982)). The government's objective in the search was clear; they sought to discover evidence of the alleged narcotic transaction. Indeed, Agent Maloney specifically told Barbara that they were looking for money, narcotics, and guns. As stated in Ross, "[a] lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search." Ross, 456 U.S. at 820-21, 102 S.Ct. at 2170-71. It is undisputed that the toolbox and desk drawer were big enough to contain the currency seized. As such, in the absence of an express limitation upon the consent as given,[2] the agents

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[2] The Seventh Circuit has held that "the scope of a consent search is limited by the breadth of the actual consent." United

were authorized to search the toolbox and desk. See United States v. Lechuga, 925 F.2d 1035, 1042 (7th Cir.1991) (general consent to search apartment included consent to search suitcase located in a closed closet).

Moreover, the fact that the toolbox was locked is immaterial to the agents' authority to open it under the existing circumstances. To be sure, this court is hesitant to conclude that a reasonable officer could interpret a general consent to search a business premises to include the permission to open a locked toolbox stored in that premises. Indeed, there is some evidence to indicate that Saadeh, the purported owner of the toolbox, operated out of Euro-Tech as an independent contractor – a condition indicating that the toolbox existed as an independent entity of the business premises. Such a determination, however, is unnecessary under the circumstances of this case. Upon discovering the toolbox and noticing that it was locked, the agents asked Saadeh, who was in the room at the time, who owned the toolbox. Saadeh responded that it was his, prompting an agent to ask for the keys to unlock it. Rather than protest, Saadeh voluntarily handed the agent the keys. By virtue of his actions and inactions, Saadeh did not remove the toolbox from the scope of Barbara's consent.

States v. Garcia, 897 F.2d 1413, 1419 (7th Cir.1990). In the instant case, the scope of consent Barbara gave on the form she completed was unlimited.

III. Conclusion

Finding the consent furnished by Barbara Sudzus valid and sufficiently distinguishable from the initial entry, this court denies defendants' motions to suppress. It is so ordered.

APPENDIX C

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

September 7, 1995

HON. RUGGERO J. ALDISERT, Circuit Judge*

HON. WILLIAM J. BAUER, Circuit Judge

HON. JOEL M. FLAUM, Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee, No. 93-2681 v. IMAD NAIM SAADEH, Defendant-Appellant.	] Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 92 CR 102 Marvin E. Aspen, Chief Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause on August 3, 1995, by defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing and suggestion for rehearing *in banc* be, and the same is hereby DENIED.

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* Hon. Ruggero J. Aldisert, of the Third Circuit, sitting by designation.